Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Preserving the Open Internet	)	**GN Docket No. 09-191**
	)	
Broadband Industry Practices	)	**WC Docket No. 07-52**
	)	

COMMENTS OF THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE

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SUMMARY

The Ad Hoc Telecommunications Users Committee supports adoption of the Commission's proposed "Open Internet" rules because preservation of non-discriminatory access to the community of Internet users is essential to every American business, regardless of its size or industrial sector. The proposed rules will protect the openness and transparency of the Internet, ensuring that every Internet subscriber has non-discriminatory access to the content, applications, or services provided by the businesses of his/her choosing. Similarly, every business in America that interacts with its customers over the Internet will benefit from protection of the Internet's openness and transparency, confident that its content, service, and applications will remain accessible to every Internet user without interference or imposition of unnecessary costs by the user's Internet access service provider.

The Commission's proposed non-discrimination rule is necessary to remedy failures in the market for "last mile" services provided by Internet access service providers. Currently, subscribers have few choices with respect to Internet access service providers. The vertical integration of Internet access service providers and last mile transmission providers along with the horizontal consolidation in the cable and telecom industries have concentrated control of last mile facilities and services into the hands of relatively few providers. The non-discrimination rule will ensure that these providers do not use their market power to extract payments from their subscribers or the businesses that provide content, applications, and services to their subscribers.

As Ad Hoc demonstrates below, the economic and social benefits of adopting a non-discrimination rule far outweigh any of the alleged costs that may result from

imposing such a requirement. As the Commission notes in the *NPRM*, the openness and transparency of the Internet have had transformative effects on the global economy. Most notably, the current model of the "open" Internet has enabled the creation of a vigorously competitive and innovative market at the Internet's "edge" for new applications, equipment, content, and business processes. Businesses and consumers have directly benefitted from the rapid innovation, improvements in quality, and reduction in prices for products and services in this market resulting in efficiencies and cost savings that have been distributed downstream to other businesses and consumers throughout the economy. By preventing discrimination based upon particular providers of content, applications, and services, the Commission's proposed rules would prevent Internet access service providers from leveraging their control over last mile transmission networks in ways that would impede competition and innovation in these burgeoning "edge" markets.

In order to fully realize the benefits of non-discrimination, Ad Hoc urges the Commission to specify that the non-discrimination rule also applies to peering practices. The voluntary establishment of bilateral peering arrangements has been critical to the successful development of the public Internet as a true "network of networks." But the unusually high concentration in the consumer broadband Internet access services market coupled with the vertical integration of at least some of these providers with extensive Internet backbone networks, creates opportunities and incentives for discrimination and anticompetitive practices that are not directly addressed or remedied by the proposed rule. Thus, the scope of the nondiscrimination rule should be expanded to prohibit an Internet access service provider from requiring that any

business purchase other products or services from that Internet access service provider as a condition for gaining access to that provider's end users.

Furthermore, the Commission should specify that the non-discrimination rule prohibits the imposition of charges by an Internet access service provider on its own subscribers to obtain access to the content, applications, or services of any particular business or individual. The rule, as proposed, prohibits the imposition of such charges only on providers of content, applications, and services. But if the Commission does not prohibit the imposition of such charges on subscribers, discrimination by the Internet access service provider would be effectively permitted by exposing subscribers to potential charges to access the content, applications, or services of their choosing.

Ad Hoc supports the Commission's proposed approach of adopting a broadly defined network management exception to the nondiscrimination rule and using a case-by-case approach to determine whether a particular network management practice is reasonable. But we urge the Commission to narrow the rule in three specific areas. First, network management for congestion purposes should be limited to addressing specific instances of network congestion, but it should not be used for the purpose of managing an oversubscribed or under-built network. Second, Internet access service providers should not be regulating the flow of content, illegal or otherwise, through the use of network management practices, and we urge the Commission to permit Internet access service providers to use network management to prohibit transfer of unlawful content only if undertaken pursuant to a properly authorized law enforcement request or order from a judicial authority. Third, Ad Hoc's general support for the "reasonable network management" exception to the proposed rules depends upon the Commission

expressly stating that this exception may not be applied in a discriminatory or preferential manner based on the specific identity of a provider of content, applications or services. So, while it would be permissible for an Internet access service provider to manage an *entire category* of network traffic in a particular way, it never be permitted to manage a particular provider's traffic, including the Internet access service provider's or its affiliate's own traffic, in a discriminatory or preferential manner.

Finally, the Commission should resolve complaints about network management practices on an expedited basis pursuant to a clear and simple dispute resolution process. Complainants should be required to make a *prima facie* case that a particular network management practice is not reasonable. To create structural disincentives for the misuse of network management practices, until the Internet access service provider has established the reasonableness of the network management practice in question, the Commission should prohibit the Internet access service provider from continued implementation of that practice until final determination by the Commission that the practice is, in fact, justified and reasonable.

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COMMENTS OF THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE

The Ad Hoc Telecommunications Users Committee submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("*NPRM*")[1] in the docket captioned above.

I. INTRODUCTION

The Ad Hoc Telecommunications Users Committee ("Ad Hoc" or "the Committee") supports adoption of the Commission's proposed "Open Internet" rules because preservation of non-discriminatory access to the community of Internet users is essential to every American business, regardless of size or industrial sector.

The Commission correctly observes in the *NPRM* that the Internet has had a transformative effect on the global economy and "embodies a legacy of openness and transparency that has been critical to the Internet's success as an engine for creativity, innovation and economic growth."[2] In the face of a substantial economic downturn

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[1] *Preserving the Open Internet Broadband Industry Practices,* GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009) ("*NPRM*").

[2] *Id.* at para. 17.

unprecedented in generations, the financial health and viability of American businesses can be improved more than ever by the cost savings and operational efficiencies attributable to the Internet and the competitive IT market flourishing at the Internet's "edge." The Commission's proposed rules will, in an economically non-disruptive manner, preserve the current openness and transparency of the Internet which is necessary for American businesses to innovate, grow, create new jobs, and lead the transformation of the global economy.

Ad Hoc represents a broad cross section of job-creating businesses that depend upon an open and transparent Internet. The Committee's members collectively spend an estimated $2-3 billion per year on purchases of communications products and services. They represent a broad array of industries in the national economy, including financial services, automotive, manufacturing, insurance, aerospace, package delivery, information technology, and transportation/logistics.

Since its formation more than thirty years ago, Ad Hoc has advocated the deregulation of competitive communications markets because the Committee's members, as high-volume consumers of communications products, have historically been among the first beneficiaries of the reduced prices and increased quality that inevitably result from competitive markets. When markets are not competitive, however, Ad Hoc has consistently supported regulation to ensure that dominant market participants can not engage in anti-competitive behavior. Because of the crucial role communications products and services play in a modern economy, market behavior that imposes economic inefficiencies and inflated costs on businesses like Ad Hoc's members (and, in turn, on the national economy as a whole) stifles innovation, retards

job growth, and reduces our nation's economic competitiveness in the global marketplace.

Participants in today's economy expect the Internet to remain open and transparent for the conduct of business and the exchange of goods and services. Any substantial diminution in that transparency and openness would significantly disrupt the business plans and expectations of companies participating at every level of the economy, from the largest corporations to the smallest entrepreneurs.

Ad Hoc supports the Commission's proposed rules because they will preserve key characteristics of the Internet that have transformed the global economy over the last few decades, reduce the uncertainty and risk of anti-competitive behavior associated with concentration and consolidation among the network service providers who supply the Internet's infrastructure, and provide a modest, effective, and flexible framework for enforcement of the rules by the Commission.

II. EVERY BUSINESS THAT RELIES ON THE INTERNET TO INTERACT WITH CUSTOMERS IS A CONTENT, APPLICATIONS, OR SERVICE PROVIDER THAT WOULD BENEFIT FROM THE PROPOSED RULES

Businesses like Ad Hoc's members, whether they are traditional "brick and mortar" companies or the newest web-based enterprises, are content, application, and service providers because they rely on the Internet to interact with their customers, vendors, and business partners. Every manufacturer that publishes product or warranty information on its web site, every bank that offers its customers access to an online banking application, every insurance company that permits its customers to file claims through its website, and every shipping company that allows its customers to track packages online is a provider of content, applications, and/or services.

Corporate use of the Internet has produced unprecedented operational efficiencies and cost savings in the business world and affects nearly every facet of the business process: from the manufacture of a product, to marketing and sales, to related customer service, and finally, to product delivery. The Internet has further enabled businesses to transform the way people work through telecommuting and collaboration tools, which reduce travel costs and energy consumption while increasing workforce efficiency and flexibility.

The *NPRM* proposes a new rule that would require Internet access service providers to treat content, applications, and services in a non-discriminatory manner. Under the new rule, Internet access service providers would not be allowed to extract payments from a content, application, or service provider for enhanced or prioritized access to the Internet access service provider's subscribers, though Internet access service providers would be free to charge their own subscribers for different service types. This rule is consistent with the current payment structures and contractual relationships that make up the Internet, pursuant to which subscribers and content, application, or service providers each pay for their own connection to the Internet. The Internet access service provider at the subscriber end does not demand extra payments from businesses communicating with its subscribers as a condition for letting packets get through to the subscriber or for providing adequate service quality.

Ad Hoc supports the Commission's proposal because it would provide certainty regarding the future structure and costs of the Internet, would protect the commercial expectations of business users and their customers, and would preserve the economic benefits of conducting business over an open and transparent Internet. In addition, by

ensuring that the only customer who pays the Internet access service provider's fees is also the customer who selects the Internet access service provider, the rule enables competition in the Internet access market to discipline provider behavior because subscribers can shift their business to another provider if their provider attempts to overcharge or engage in other unreasonable pricing practices. Any disruption of the current model that would permit Internet access service providers to leverage their control over access to their subscriber "eyeballs" by demanding payments from, or discriminating among, content, application, and service providers will undermine these market expectations, economic benefits, and competitive forces.[3]

Ad Hoc agrees with the Commission's assessment that the Internet's open, "end to end" system design has "lowered technical, financial, and administrative barriers to entry for entrepreneurs with technical skill and bright ideas."[4] This concept of a technically "agnostic" Internet, which can accommodate many transmission technologies, equipment types, and content formats, allows producers of content, applications, and services to respond quickly and efficiently to customer requirements and new technologies without being constrained by unnecessarily intrusive or restrictive transmission technologies. The agnostic Internet has also enabled vigorous competition to develop at the Internet's "edge" for new applications, equipment, content, and business processes. Businesses like Ad Hoc's members have benefitted from the

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[3] As discussed further in Section III.D below, we also urge the Commission to clarify that the "non-discrimination" rule prohibits an Internet access service provider from imposing subscriber fees that discriminate against competing providers of content, applications, or services. If Internet access service providers were permitted to favor "preferred" content or applications by charging subscriber fees for, or by degrading, traffic from non-preferred providers, the Internet access service provider would effectively eliminate the free and open Internet that the Commission seeks to preserve.

[4] *NPRM* at para. 19.

lower prices, higher quality, and rapid innovation produced by this "edge" competition. These competitive benefits ripple through the economy to mass market consumers as businesses realize substantial cost savings and production efficiencies from competitive information technologies at the Internet's edge and pass those savings on to their customers.

The competition and innovation at the Internet's edge are threatened, however, by the lack of competition among last mile providers. Vertical integration of Internet access service providers with last mile transmission providers,[5] horizontal consolidation in the cable and telecom industries,[6] and the lack of competing facility-based providers of broadband last mile services[7] are among the market shifts that have combined to concentrate control of last mile services into the hands of a limited number of Internet access service providers. In addition, as discussed in greater detail in Section III below, every Internet access service provider, even those in robustly competitive markets, has an inherent monopoly on access by third parties to its subscribers once the subscriber chooses that Internet access service provider, regardless of the competitive choices which may (or may not) have been available to those subscribers at the time that they

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[5] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee,* 16 FCC Rcd 6547 (2001).

[6] *E.g. Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246 (2002); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005); *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007).

[7] *Special Access Rate for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005).

made their choice. By preventing Internet access service providers from discriminating against traffic from unaffiliated providers or imposing new charges on content, application, and service providers, the Commission's proposed rules would prevent Internet access service providers from leveraging their control over last mile transmission networks in ways that would impede competition and innovation in edge markets.

III. THE COMMISSION SHOULD ADOPT THE PROPOSED NON-DISCRIMINATION RULE

The Commission's proposed Net Neutrality rules appropriately balance the legitimate network management concerns of "last mile" providers – such as the ILECs, the cable companies, and wireless carriers – with the need to protect subscribers and competing providers of Internet access, content, applications, and services from Internet access service providers' market power with respect to the "last mile." Ad Hoc fully supports the FCC's proposed rule and urges the Commission to adopt it expeditiously. As we demonstrate below, however, the Commission must expand the scope of the rule to include peering practices and clarify that the general prohibition against discrimination also applies to any charges collected from end users for enhanced or prioritized "last mile" services.

A. The proposed rule is necessary to remedy market failure in "last mile" services

The *NPRM* proposes that "[s]ubject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a non-discriminatory manner."[8] The *NPRM* clarifies that "non-

[8] *NPRM* at para. 104.

discriminatory" means that "a broadband Internet access service provider may not charge a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband Internet access service provider."[9] The Commission proposes several limited exceptions to this general rule with respect to the needs of law enforcement, public safety, national and homeland security authorities.

As the *NPRM* notes, opponents of net neutrality regulation claim that the broadband Internet access market is itself highly competitive and that any non-discrimination rule is therefore unnecessary because discriminatory practices would be constrained by competitive marketplace forces.[10] Other opponents have argued that emerging competition from wireless Internet access services further obviates the need for net neutrality rules.[11] But these arguments fail for two reasons.

First, the competition that these arguments rely on does not yet exist, and when or whether it will evolve is still unknown. At present, in most markets, there are no more than two consumer broadband Internet access service providers and in many cases only a single such provider.[12] Moreover, the existing providers are themselves vertically integrated enterprises that offer, in addition to basic last-mile connectivity to

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[9] *NPRM* at para. 106.

[10] *NPRM* at para. 74.

[11] *See*, *e.g.*, Letter from James W. Cicconi, Senior Executive Vice President, External and Legislative Affairs, AT&T to Julius Genachowski, Chairman, FCC, GN Docket No. 09-191 (filed Dec. 15, 2009) ("*Cicconi Letter*") at 2, referencing "the robustly competitive wireless broadband environment." *See also NPRM* at paras. 155 and 158.

[12] FCC Staff National Broadband Plan Presentation, (Sept. 29, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf. ("*Broadband Plan Presentation"*), at 135; *see* also, Letter from Lawrence E. Strickling, Assistant Secretary for Communications and Information and Administrator, National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce to Julius Genachowski, Chairman, FCC, , GN Docket No. 09-51 (filed Jan. 4, 2010) ("*NTIA 1/4/10 Letter*"), at 3; Letter from Christine A. Varney, Assistant Attorney General, U.S. Department of Justice Antitrust Division to Julius Genachowski, Chairman, FCC, GN Docket No. 09-51 (filed Jan. 4, 2010) ("*DoJ 1/4/10 Letter*"), at 13-14.

the Internet, a variety of content, applications, and services in competitive downstream markets, which creates powerful financial incentives and opportunities for them to extend preferential treatment to their own content, applications, and services.[13] The wireless broadband alternatives that some hold up as sources of competition[14] are still in their infancy, and many questions remain about how they will eventually develop. Both the Justice Department and NTIA have noted the many uncertainties with respect to wireless broadband competition, including when[15] (or even whether) the new spectrum necessary for wireless broadband expansion will be made available,[16] whether the incumbent wireline providers or independent companies (*i.e*., new competitors) will acquire that new spectrum,[17] and the extent to which broadband wireless will evolve to be a direct substitute for wireline broadband for the majority of customers.[18] Thus, the notion that there are "competitive marketplace forces" sufficient to force monopoly or duopoly incumbents to operate in a non-discriminatory and competitively neutral manner is not borne out by marketplace realities.

Second, even if broadband Internet access markets were robustly competitive, the proposed rule would still be necessary because that competition cannot constrain the market behavior of broadband Internet access service providers towards non-

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[13] As NTIA observes, the existing "[b]roadband service providers have an incentive to use their control of those underlying facilities to advantage their value-added services or to disadvantage competitive alternatives." *NTIA 1/4/10 Letter* at 4.

[14] *See generally NPRM* at para. 155.

[15] In the FCC's own words, "[I]t will take years for any new spectrum to reach the market." *Broadband Plan Presentation*, at 63.

[16] *NTIA 1/4/10 Letter* at 5.

[17] *Id.*; *see also DoJ 1/4/10 Letter* at 23-24 ("there are substantial advantages to deploying newly available spectrum in order to enable additional providers to mount stronger challenges to broadband incumbents.")

[18] *DoJ 1/4/10 Letter* at 8-10.

affiliated content, application, and service providers. Once a subscriber chooses a wireline or wireless Internet access provider, her content, application, and service providers are captive to that provider regardless of the competitive choices, if any, available to her before subscription. As the Commission appears to recognize at para. 73 of the *NPRM*, any actual, emerging, or potential competition for broadband Internet access services in the subscriber's market simply becomes irrelevant for purposes of disciplining the provider's behavior towards content, application, and service providers once the subscriber's choice of access provider has been made. As a result, the FCC cannot rely upon emerging wireless competition, or any other actual or potential sources of competition for the subscriber's service, to conclude that there is no need for the type of net neutrality and non-discrimination rules proposed in the *NPRM*.

The Commission has previously determined that, despite the presence of multiple competing providers of a subscriber's service, market structures and subscriber/supplier relationships like those described in the preceding paragraph nevertheless result in market failure requiring regulatory intervention to achieve the goals of the Communications Act. In its 1996 *Access Charge Reform Order*,[19] the Commission analyzed terminating access charges in the switched voice market, which are analytically identical to those charges addressed by the non-discrimination rule proposed in this docket. Terminating switched access charges are imposed by local

[19] *Access Charge Reform*, CC Docket No, 96-262; *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1; *Transport Rate Structure and Pricing*, CC Docket No. 91-213; *Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket No. 96-263, Notice of Proposed Rulemaking, Third Report and Order and Notice of Inquiry, 11 FCC Rcd 21354 (1996). ("*Access Reform NPRM")*

exchange carriers ("LECs") on interexchange carriers ("IXCs") for terminating long distance calls to the LECs' customers. In that context, the Commission observed that:

> [f]or terminating access, the choice of service provider is made by the call*ed* party ....The call*ing* party, or its long-distance service provider, has little or no ability to influence the call*ed* party's choice of service provider. Thus, it appears that even with a competitive presence in the market, terminating access may remain a bottleneck controlled by whichever LEC provides access for a particular customer. As such, the presence of unbundled network elements or facilities-based competition may not affect terminating access charges.[20]

Significantly, the argument that terminating access market power calls for regulation was actually made in that docket by NYNEX, one of Verizon's predecessor companies:

> New entrants into the exchange access market, such as competitive access providers (CAPS), have been presumptively classified as non-dominant because they have been deemed not to have the ability to exercise market power in particular service areas. *NYNEX has suggested that there is a need for regulation of certain access services, particularly terminating access, offered by all LECs, including new entrants.*[21]

The Commission concluded that:

> The factors that warrant continued regulation of incumbent LECs' terminating access service appear to apply to all access providers, including competitive LECs, because these new entrants appear to possess market power over IXCs needing to terminate calls. As previously discussed, the recipient of a call, the called party, selects the carrier that provides the terminating access for the calls destined for that party….Because the paying parties do not choose the carrier that terminates their interstate calls, competitive LECs potentially could charge excessive prices for terminating access.[22]

In the *April 2001 CLEC Access Charge Order*, [23] the Commission once again addressed the economic impact of terminating switched access charges. The

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[20] *Id.* at para. 271. (Emphasis added.)

[21] *Id.* at para. 278. (Footnotes omitted and emphasis added.)

[22] *Id.*

[23] *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report And Order And Further Notice Of Proposed Rulemaking, 16 FCC Rcd 9923, (2001) *("CLEC Access Charge Order")*.

Commission determined that, even though the LEC's subscriber may have competitive choices for its local exchange service provider, once the subscriber selects that provider, IXCs must pay the charges set by the terminating LEC even though they cannot select the LEC who terminates the call. The Commission reiterated the concerns it had raised in the *Access Reform NPRM,* observing that:

> [i]n the *Access Reform NPRM*, the Commission sought comment on whether CLECs can exercise market power with regard to terminating access services and whether and how the Commission should regulate those services. The Commission noted the differences between the originating and terminating access markets....[T]he Commission recognized that, with terminating access, the called party chooses the access service provider, while the decision to make the call and the ultimate responsibility to pay for the call reside with the calling party, and the calling party's IXC must pay for the terminating access service. Because of this disjunction implicit in terminating access, neither the party placing a long distance call, nor that party's IXC, can easily influence the called party's choice of service provider. The Commission noted that this may give CLECs the incentive to charge excessive rates for terminating access service.[24]

Elaborating on the principle, the Commission found that:

> [i]It appears that the CLECs' ability to impose excessive access charges is attributable to two separate factors. First, although the end user chooses her access provider, she does not pay that provider's access charges. Rather, the access charges are paid by the caller's IXC, which has little practical means of affecting the…called party's choice of provider …and thus cannot easily avoid the expensive ones. Second, the…IXCs are effectively unable either to pass through access charges to their end users or to create other incentives for end users to choose LECs with low access rates, [so that] the party causing the costs – the end user that chooses the high-priced LEC – has no incentive to minimize costs. Accordingly, CLECs can impose high access rates without creating the incentive for the end user to shop for a lower-priced access provider.[25]

The situation that the Commission was addressing in the *April 2001 CLEC Access Charge Order* is precisely analogous to the communications between an Internet access service provider's subscriber and third party content, application, or

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[24] *Id.* at para. 10, footnote references omitted.

[25] *Id.* at para. 31, footnote references omitted.

service providers. The subscriber chooses the Internet access provider and, but for the Commission's proposed non-discrimination rule, that provider would be in exactly the same position as the LEC in terms of its incentive and ability to impose excessive charges upon content, application, or service providers communicating with its subscribers. As was true for calling parties and IXCs, the content, application or service provider would have no practical means of disciplining excessive charges by the subscriber's choice of Internet access service provider. Under these market conditions, the Commission's proposed non-discrimination rule is necessary to protect content, application, and service providers from the market power of the terminating Internet access service provider regardless of how competitive that provider's Internet access market may be.

B. The economic and social welfare benefits of requiring non-discriminatory access to the Internet outweigh any "costs".

The *NPRM* seeks comment on the costs and benefits of the proposed non-discrimination rule, both in the near-term and long-term. In particular, the *NPRM* asks whether "a rule prohibiting broadband Internet access service providers from charging content, application and service providers fees [would] be likely to result in higher social welfare than would result in a market in which no constraints on such fees are imposed?"[26]

Opponents of a strict non-discrimination rule of the type being proposed in the *NPRM* have sought to portray a tension between "preserving the open character of the Internet," on the one hand, and a "government policy [that] preserve[s] and expand[s]

[26] *NPRM* at para. 111.

incentives that drive the substantial private investment necessary so that the promise of the Internet is fully realized and maximally available." [27] The implication of this and similar rhetoric being advanced by various Internet access service providers is that "a strict non-discrimination standard could inadvertently limit the availability of creative and innovative services that consumers may want to purchase [and] ... would completely ban voluntary commercial agreements for the paid provision of certain value-added broadband services which would needlessly deprive market participants, including content providers, from willingly obtaining services that could improve consumers' Internet experiences."[28] According to AT&T, "such a ban could harm innovation and potentially delay critical infrastructure investment by prohibiting services that prove to be neither anti-consumer nor anti-competitive."[29]

Contrary to the arguments advanced by AT&T and parties who share its view (not to mention sharing its self-interest in creating new fees for Internet users), the economic and social welfare gains arising from a strict non-discrimination rule easily outstrip whatever "costs" such a policy might engender. As a threshold matter, it is useful to examine the tension that AT&T claims to exist as between an "open Internet" and "incentives for infrastructure investment." This is not the first time such arguments have been raised. Indeed, similar contentions were advanced as far back as the 1960s with respect to the use of customer-provided devices on the AT&T/Bell System network,

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[27] *Cicconi Letter* at 1.

[28] *Cicconi Letter* at 1, 2.

[29] *Id.* at 2.

which were then being pejoratively characterized as "foreign attachments."[30] Variations on this same theme were also raised by the old AT&T/Bell System in opposition to the introduction of competition in the long distance market.[31] All have been shown to be devoid of merit or substance. The creation of an "open" public switched telephone network as a result of the customer equipment and long distance decisions cited *supra* produced massive innovation, investment and competition in the adjacent customer premises equipment and long distance markets. Indeed, the early commercial development of the Internet itself – which was predicated upon consumers' ability to attach personal computers and modems to the dial-up public switched telephone network – is a clear and direct beneficiary of this policy.

Importantly, there is another investment-related tension that AT&T overlooks – the willingness and ability of independent content, application and service providers (*i.e.,* those not affiliated with an access service provider) to invest and innovate in these downstream sectors if they are forced to pay additional and excessive charges for access to end user subscribers. These entrepreneurial and innovative ventures depend critically upon an open Internet with the continued assurance of non-discriminatory access to all Internet end users. If wireline and wireless access providers are permitted to exploit their monopoly control of end user subscribers to the detriment of downstream content, application and service providers, demand for such services will be

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[30] *See Carterfone Device*, 13 FCC 2d 420 (1968); *Hush-A-Phone Corp. v. U.S.*, 238 F. 2d 266 (D.C. Cir., 1956).

[31] *See, e.g., Specialized Common Carrier Services,* 29 FCC2d 870, 876-77 (1971)*, aff'd sub nom. Washington Utilities & Transportation Com'n v. FCC,* 513 F.2d 1142 (9th Cir.)*, cert. denied,* 423 U.S. 836 (1975)*; MCI Telecommunications Corp. v. FCC,* 561 F.2d 365, 367-70 (D.C. Cir. 1977)*, cert. denied,* 434 U.S. 1040 (1978).

suppressed, their potential profitability will be diminished, and investment in those sectors will necessarily be less forthcoming.

The Internet developed under robustly competitive conditions in an Internet access service market consisting of numerous providers no one of which had the ability to exploit its "eyeball" subscriber base for any extended period of time. It is only within the past several years, as the end user Internet access market has devolved into a telco/cable broadband duopoly, that the maintenance of a competitive Internet is threatened. Absent regulatory constraints on their exercise of market power, the access providers' market power can be readily extended into adjacent upstream (*e.g.,* Internet backbone) and downstream (*e.g.,* content and application) markets that are presently highly competitive, leading ultimately to less choice, higher prices, and less overall investment and innovation.

In that environment, AT&T's suggestion that "voluntary commercial agreements for the paid provision of certain value-added broadband services"[32] would obviate the need for a strict non-discrimination rule can only be seen as pure fantasy. The negotiation of "voluntary" interconnection agreements pursuant to Sec. 252(c) and post-*USTA II* "commercial agreements" by CLECs and ILECs following the elimination of UNE-P demonstrates that negotiations between parties with dramatically disproportionate market power resemble the unilateral imposition of adhesion contracts dictated by the party with market power rather than any sort of "voluntary" arm's length dealing between equals.[33] The deterioration in the competitive landscape for the local

[32] *Cicconi Letter* at 2.

and long distance telecommunications market that resulted from the elimination of most of the Sec. 251/252 and 271/272 pro-competitive initiatives[34] demonstrates the vacancy of AT&T's latest argument.

Payment demands by Internet access service providers in highly concentrated markets for access to their subscribers will suppress both the demand for broadband services as well as the willingness of content, application and service providers to innovate and invest. The deadweight loss to the US economy will be substantial, threatening the nation's current preeminent position in the global information economy.

C. The Proposed Rule should apply to peering practices

While terminating charges in the switched access context are structurally identical to terminating charges in the Internet access context, there are also important distinctions between the pricing models that have been applied in the switched access world and those that have emerged – largely without any regulatory pressure or prescription – in the Internet world. These differences require the Commission to expand the scope of the proposed rule to include peering practices.

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[33] Since 1996, state public utility commissions have dealt with several thousand petitions by CLECs for arbitration of interconnection agreements, which can be initiated only after attempts at bilateral negotiation with the ILEC had been unsuccessful in achieving an agreement consistent with the requirements of Section 251 of the Act.

[34] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *corrected by* Errata, 18 FCC Rcd 19020 (2003) ("*Triennial Review Order Errata*"), *aff'd in part, remanded in part, vacated in part*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"). From their peak in June 2004, UNE-P (and their negotiated "commercial agreement" UNE-P replacement wholesale product) lines dropped from 17.1-million to 4.9-million as of June 2008. FCC, *Local Telephone Competition: Status as of June 30, 2008*, rel. July 2009, at Tables 4, 5. The two largest competitive long distance carriers were acquired by the two largest RBOCs. The only substantive growth in "CLEC" competition has come from the incumbent cable providers, which, like ILECs, are similarly not subject to regulations requiring mandatory, non-discriminatory unbundled access to their networks.

In the case of switched access services, fixed (monthly) end user charges do not recover the full cost of providing the last mile of service nor the costs associated with carrying long distance traffic to or from other users of the public switched telephone network ("PSTN"). These costs are traditionally recovered via separate charges to the IXC for access elements and to the subscriber for long distance calling and premium vertical services such as call waiting and caller ID. In addition, switched calls (local and long distance) placed over the PSTN are traditionally priced on a "sent-paid" or "sender-paid" basis, meaning that the party originating the call pays the entire usage-based charge for the call, without any usage-based charge to the recipient for use of the recipient carrier's network. [35]

This is not the case with the pricing and revenue-sharing arrangements that have developed – and without any regulatory participation or prescription – in the Internet world. The basic charge for Internet access services covers both the last mile access link to the subscriber and connectivity to a peering point within the Internet cloud. At those peering points, however, traffic is exchanged among individual service providers on a peering or "bill-and-keep" basis. The identity of the particular party initiating an Internet session is thus of no consequence; "usage" is measured in terms of the volume of packets being delivered by one network to another. If an end user communicates with a host website and requests the download of, for example, a video clip, the packets communicating the request from the end user to the video content provider are considered to have been sent by the end user's network to the content provider's

[35] The PSTN pricing regime also supports an alternative payment arrangement whereby the call recipient, rather than the sender, can pay the IXC's charges for a call using so-called "toll-free" service arrangements, *i.e.,* 800/888/877866 services. In all other respects, the PSTN payment and revenue-sharing model adheres to the model of sender-paid services.

network. The video clip itself is considered to have been sent by the content provider's network to the end user's network. Each network is responsible for providing sufficient bandwidth to the "peering point" in the Internet "cloud" where the exchange of packets takes place to carry the requested stream of packets between the peering point and the particular source and destination.

Under this model, users – both end users and content providers – select and pay for the bandwidth each requires between their respective premises (or, in the case of content providers, the physical location of their servers) and the point(s) within the Internet "cloud" where inter-network packets are exchanged. Each customer is thus responsible for the cost of both "last mile" and "middle mile" facilities up to the peering point. Each "member" of the Internet is able to select from a range of bandwidth capacities – from simple dial-up to multi-gigabit optical fiber facilities – and to purchase and pay for only the bandwidth that is actually required. Since there is no exchange of cash at Internet peering points, there is no economic basis for any arrangement that would extract revenue from entities on one side of the peering point to those on the other side.

The voluntary establishment of bi-lateral peering arrangements has been critical to the development of the public Internet as a true "network of networks." Prior to the large-scale entry of the regional Bells into the consumer broadband Internet access service business, there was little integration between Internet service providers providing Internet access to mass market consumers and Internet backbone providers

offering long-haul backbone transport services and internetworking arrangements.[36] That has now changed. Both AT&T and Verizon are themselves major owners of Internet backbone facilities and are major providers of Internet backbone services. The unusually high concentration of the consumer broadband Internet access services market, coupled with the vertical integration of at least some of these providers with extensive Internet backbone networks, creates additional opportunities and incentives for discrimination and anticompetitive practices that are not directly addressed or remedied by the proposed rule.

For example, absent regulatory constraints, an entity with an extensive consumer "eyeball" population and backbone network could require content providers and others desiring to communicate with its "eyeball" customers to purchase its Internet backbone services at the content provider's server – in effect, bypassing peering points entirely and cutting off other, non-integrated Internet backbone providers from competing for the content provider's business. Accordingly, the scope of the non-discrimination rule should be expanded to prohibit a broadband Internet access service provider from requiring that a content, application, or service provider purchase other products or services as a condition for gaining access to the broadband Internet access service

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[36] In the mid to late 1990s, consumer Internet access was primarily provided on a dial-up basis, and the major Internet access service providers – AOL, Prodigy, and CompuServe -- were not in the backbone business at all. Backbone services were provided by companies that were not in the consumer Internet access service provider business, such as UUNet (later MCI), Sprint, and Global Crossing. AT&T Corp., another major Internet Backbone Provider, was briefly in the consumer broadband Internet access service provider business following its acquisitions of TCI and MediaOne, which AT&T operated as AT&T Broadband. Verizon and SBC (now AT&T Inc.) were not even allowed into the Internet Backbone business (in-region) until they had obtained Sec. 271 interLATA entry, and even then did not seriously enter the backbone business until their respective acquisitions of MCI and AT&T Corp. Even in the early 2000s, as companies like AT&T Corp. began expanding into the consumer broadband business, their backbone and Internet access service provider businesses were operated independently and without any efforts to leverage their control of consumer "eyeball" subscribers into the adjacent Internet backbone market.

provider's end user subscribers, or otherwise linking or tying such access to any other aspect of the broadband Internet access service provider's business.

D. The Commission should clarify that the prohibition against discrimination applies to subscriber charges for enhanced or prioritized services in the "last mile"

While the proposed rule as written would prevent an Internet access service provider from "charg[ing] a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband Internet access service provider,"[37] it would not prohibit the provider from imposing such charges on its own subscribers. The mechanics of assessing subscriber fees may differ from assessing fees against content, application or service providers but their potential discriminatory effect is virtually identical, particularly where an end user's Internet service provider offers content in downstream markets that compete with nonaffiliated content or applications providers. The following examples illustrate the problem:

(1) The Internet service provider offers its customers an online movie download service in competition with similar services being offered by nonaffiliated downstream competitors such as Netflix and Amazon. The provider imposes charges upon its end user subscribers for access to competing services, but applies no such charge for access to its own download service.

(2) The Internet service provider enters into a joint marketing "partnership" with an online commercial bank that offers a range of consumer banking services to the provider's customers in direct competition with other nonaffiliated commercial banks that can be accessed by those same end users over the Internet. The Internet provider applies a charge for access

[37] *NPRM* at para. 106.

to competing nonaffiliated banks, but imposes no comparable charge for access to its own banking "partner."

In these examples, the fact that the Internet access service provider imposes a charge on its own end user customers for content, applications, or services from unaffiliated entities, rather than charging those entities directly, is of no consequence. In either case, the Internet provider is leveraging its *de facto* monopoly control over access to its end user subscribers and discriminating against downstream rivals in order to advantage its affiliate or joint marketing "partner."

The Commission should therefore clarify that the general prohibition against discriminatory treatment of content, application, or service providers applies to subscriber charges established by an Internet access service provider for enhanced or prioritized service on the "last mile." Providers can be free to establish such charges but their fee structure cannot be discriminatory. Otherwise, an Internet access service provider could comply with the letter of the rule – by charging only the subscriber for enhanced or prioritized service – and still frustrate the purpose of the rule – by establishing higher charges for traffic from competing content, applications, or services that transit the subscriber's enhanced service, or establishing preferential treatment for its own traffic.

Some observers have suggested that there is no need for enhanced or prioritized service over the public Internet because any currently available content or application can be fully supported over the current "best efforts" Internet, provided that the end user and the content, application, or service provider have subscribed to appropriate bandwidth capacity for their "last mile" services.

Ad Hoc offers no opinion as to the accuracy of this factual claim. To the extent that there is a legitimate technical basis for the offering of differentiated priority transmission services, however, the prohibition against discriminatory charges should not preclude the offering of generic prioritization services and features at appropriate competitive (*i.e.,* cost-based) price levels. Thus, just as the customers of Internet access service providers (both end user subscribers and content, application, or service providers) have the ability today to select and pay for the bandwidth they require to support the type and volume of Internet access they require, they should not be denied the option of specifying and paying for the grade of service, in terms of such attributes as packet latency and priority, needed to support a particular generic application. However, the non-discrimination rule must require that any such differentiated services or features may be offered only on a generic basis – *i.e.,* expressed in terms of their technical attributes and specifications rather than any identification of a specific service, application or content provider.

IV. THE COMMISSION SHOULD ALLOW INTERNET ACCESS SERVICE PROVIDERS TO ENGAGE IN REASONABLE NETWORK MANAGEMENT SUBJECT TO CLEARLY STATED LIMITATIONS

Ad Hoc supports the Commission's proposed approach of adopting a broadly defined network management exception to the non-discrimination rule and using a case-by-case approach to determine whether a particular network management practice is reasonable. Given the complexity and pace of innovation and change in networking technologies, any detailed specification of acceptable and unacceptable network management practices would be burdensome to produce and quickly outdated. But as set forth further in Section IV.A below, we urge the Commission to state clearly in the

adopted rule that the network management exception to the non-discrimination rule must, itself, be applied by Internet access service providers in a non-discriminatory manner.

In order to resolve any disputes a party might raise about the reasonableness of a particular network management practice, the Commission should establish simple and accessible procedures for resolving, on an accelerated basis, complaints related to network management practices. The Commission should be prepared to engage in rigorous and expedited enforcement of the reasonableness standard to ensure that the "reasonable network management" exception is not subject to manipulation and exploitation by an Internet access service provider.

A. Reasonable Network Management Practices Should be Applied by Internet Access Service Providers on a Non-Discriminatory Basis.

Ad Hoc generally supports the Commission's proposed exception to the general non-discrimination rule for "reasonable network management" which would allow Internet access service providers to take reasonable measures necessary to address congestion, quality of service issues, spam or malware, or the transfer of unlawful content. But we urge the Commission to define certain parts of the proposed rule more narrowly. [38]

First, while network management may be required to address a specific *instance* of network congestion, the Commission should clarify that it cannot be used for the purpose of managing an oversubscribed or under-built network. Thus, Ad Hoc supports

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[38] In para. 141 of the *NPRM*, the Commission requested specific wording for the definition of "reasonable network management."

the position taken in comments filed today by the Open Internet Coalition which note that expansion of backbone transmission capacity has historically been the best approach, both technically and economically, for addressing issues related to network congestion. We also appreciate the Commission's concern regarding the need to balance the costs associated with capacity increases against the benefits realized.[39] We therefore encourage the Commission to specify that "reasonable" network management shall be limited to addressing specific instances of congestion that would result in imminent degradation of network performance if not remedied through network management practices. And we further urge the Commission to remain vigilant against attempts by Internet access service providers to use network management for congestion relief as a pretext for degrading service to competitors or giving preferential treatment to their own prioritized services when increases in network capacity could more easily and quickly alleviate the alleged congestion problem.

Second, we further support the comments filed by the Open Internet Coalition stating that network management is an unnecessary and ineffective tool for enforcing laws related to the transfer of unlawful content. Internet access service providers should not be "deputized" to make determinations about the lawfulness of content being transmitted, an obligation that properly resides with law enforcement authorities. Similarly, the Commission should not place itself in a position of having to evaluate claims related to the lawfulness of content which would require legal determinations for which the Commission lacks the subject matter expertise and legal jurisdiction. Therefore, we urge the Commission to permit Internet access service providers to use

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[39] *NPRM* at para. 80.

network management for purposes of preventing or ending the transfer of unlawful content only if undertaken pursuant to a properly authorized law enforcement request or order from a judicial authority.

Third, notwithstanding our general support for the "reasonable network management" exception to the proposed rules, Ad Hoc strongly urges that the Commission expressly state that the exception for reasonable network management would never permit discriminatory or preferential treatment of traffic based on the specific identity of a content or application service provider. Thus, it would be permissible for an Internet access service provider to manage an *entire category* of network traffic in a particular way but it would be impermissible to manage a particular provider's traffic, including the Internet access service provider's own traffic or its affiliate's, in a discriminatory or preferential manner. For example, an Internet access service provider might need to prioritize all VoIP traffic to avoid latency problems and would be permitted to do so under the rule (provided that such prioritization is reasonable), but it could not prioritize solely the traffic of a particular VoIP provider, such as the traffic provided by an affiliate or "strategic partner" of the Internet access service provider.

To that end, Ad Hoc requests that the Commission affirmatively declare that network management practices are *per se* unreasonable if they discriminate based upon the identity of a content or application service provider or based upon the actual content (rather than generic type of traffic) of a particular communication. Furthermore, the Commission should specify that that any reasonable network management practice

must be uniformly and objectively applied to remedy the actual negative impact on the network.

B. The Commission Should Resolve Complaints about Network Management Practices on an Expedited Basis pursuant to a Clear and Simple Dispute Resolution Process

In the event that any party brings a complaint to the Commission regarding a particular network management practice, the Commission should ensure that a clear, simple, and expedited process for hearing such complaints is established and readily accessible to potential complainants. The Commission should minimize the burdens associated with bringing complaints to ensure that individuals and small businesses that rely on their Internet access have a prompt hearing and resolution.

Ad Hoc also urges the Commission to adopt an enforcement system that creates structural disincentives for any Internet access service provider to delay resolution of a complaint. Therefore, the Commission should establish that a complainant has the burden of presenting sufficient evidence to make a *prima facie* showing of discriminatory treatment with respect to a specific network management practice. Once the complainant makes that showing, the burden of proof should shift to the Internet access service provider to show that the network management practice in question is reasonable. To discourage delaying tactics in the adjudication and enforcement process, the Commission should delegate to the Enforcement Bureau the authority to order immediate discontinuance of the challenged network management practice pending final resolution of the complaint once the complainant meets its burden of showing discrimination.

V. THE DEFINITION OF "MANAGED SERVICES" IS TOO VAGUE AND AMBIGUOUS TO PROVIDE A REASONABLE OPPORTUNITY FOR COMMENT

In Section IV.G of the *NPRM*, the Commission identifies a category of services that are "Internet-Protocol based offerings (including voice and subscription video services, and certain business services provided to enterprise customers), often provided over the same networks used for broadband Internet access service," which have not been classified by the Commission for regulatory purposes.[40] The *NPRM* refers to these types of services as "managed" or "specialized" services and notes that their use "may lead to increased deployment of broadband networks."[41] The Commission seeks comment on whether and, if so, how it should regulate such services and further indicates that it may be appropriate to exclude them from the Open Internet rules proposed by the Commission.[42]

The *NPRM* fails to provide sufficient information regarding the nature of the "managed or specialized services" to permit comment by interested parties. The Commission has not adequately identified the service characteristics or factors that would distinguish such services from those subject to regulation or that would justify a broad exemption from the Commission's proposed non-discrimination rule.

Of particular concern to Ad Hoc is the Commission's reference to "certain business services provided to enterprise customers." "Managed service" is a term of art in the world of enterprise services that refers to the monitoring and management of a customer's equipment and network services by a network service provider acting as the

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[40] *NPRM* at para. 148
[41] *Id.*
[42] *Id.* at para. 149.

customer's agent and for which the enterprise customer pays its vendor a management fee. For example, an enterprise customer might pay its network service provider to configure its edge routers, monitor them remotely to ensure they remain online, and proactively perform any maintenance (remotely or through a physical "truck roll") or replacement of inoperative equipment in the event that problems or errors are detected by the provider or reported by the enterprise customer. The telecommunications services associated with the managed equipment are provided on a separate, and where required, regulated basis.

By contrast, the *NPRM* proposes the label "managed services" for what appear to be certain types of latency-sensitive content and/or applications. The examples cited by the *NPRM* are AT&T's "U-verse, multi-channel, Internet-Protocol-based video service" and specialized "telemedicine, smart grid, or eLearning applications that may require or benefit from enhanced quality of service rather than traditional best-effort Internet delivery."[43] But the *NPRM* fails to explain the difference between the content and applications it cites as examples of managed services and other latency sensitive applications (such as VoIP) to which the proposed rules *would* apply. The Commission also does not indicate why the quality of service issues related to such services cannot be (or are not already being) adequately addressed through the use of private networks or investment in additional bandwidth rather than wholesale exemption of such services from non-discrimination requirements.

[43] *NPRM* at para. 150.

Therefore, Ad Hoc urges the Commission to refrain at this time from establishing a broad exemption from the general non-discrimination rule for so-called "managed" or "specialized" services pending the release of further information regarding what these services are. Based on the particular services identified and the definitions proposed in the *NPRM*, no exemption is appropriate or necessary, and the proposed rules should apply. We encourage the Commission to seek further comment on this issue after it identifies with greater specificity those services it intends to include within this category and details specifically the distinguishing characteristic of these services which make the application of the proposed rules unworkable or inappropriate.

VI. CONCLUSION

Ad Hoc urges the Commission to adopt policies consistent with the views and information provided above.

Respectfully submitted,

THE AD HOC TELECOMMUNICATIONS
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Certificate of Service

I, Dorothy Nederman, hereby certify that true and correct copies of the preceding Reply Comments of Ad Hoc Telecommunications Users Committee were filed this 14th day of January, 2010 via the FCC's ECFS system.

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